for consumption and to continue to collect the cash deposits previously ordered.

IV. STATEMENT

A. The Antidumping Investigation And Antidumping Duty Order

Pursuant to a petition filed by Micron on April 22, 1992, the United States Department of Commerce ("Commerce") conducted an antidumping duty investigation regarding imports of DRAMs from Korea. Following determinations by Commerce that the subject merchandise was being sold at less than fair value, and by the U.S. International Trade Commission that the subject imports were causing material injury to the domestic industry (including Micron), Commerce published an antidumping duty order. *Antidumping Duty Order And Amended Final Determination: Dynamic Random Access Memory Semiconductors Of One Megabit And Above From The Republic Of Korea*, 58 Fed. Reg. 27520 (Dep't Commerce May 10, 1993). Pursuant to this order, importers of DRAMs originating in Korea and manufactured by LG Semicon, Co. Ltd. (formerly Goldstar Electron, Co., Ltd.) ("LG Semicon") or by Hyundai Electronics Industries, Inc. ("Hyundai") were required to post cash deposits of estimated antidumping duties at the time of entry. The applicable duty deposit rates were 4.97% for DRAMs manufactured by LG Semicon and 11.16% for DRAMs manufactured by Hyundai. *Id.*

B. Statutory And Regulatory Provisions For Administrative Review Of The Antidumping Order

Under the antidumping duty statute and Commerce's implementing regulations, the estimated antidumping duty deposited at the time of entry may be subject to a retrospective review to determine whether the cash deposit rate fairly reflects the margin of dumping for those transactions subject to review. 19 U.S.C. § 1675(a); 19 C.F.R. § 353.22(a) (1995) (current version at 19 C.F.R. § 351.213(b)). Each year during the anniversary month of the antidumping duty order, reviews may be requested by the foreign producer, the exporter, the importer, or domestic interested parties. 19 U.S.C. § 1675(a). At the conclusion of a review, Commerce issues liquidation instructions directing the Bureau of Customs and Border Protection ("Customs") to assess antidumping duties on entries covered by the review. The assessments may be at rates higher or lower than the cash deposit rates applicable at the time of entry. If the rate determined in the review is higher, the importer must pay the difference (with interest); if the rate determined in the review is lower, the difference is refunded (with interest). If a party does not request a review, that party's entries are subject to automatic assessment at the cash deposit rates. 19 C.F.R. § 353.22(e) (1995) (current version at 19 C.F.R. § 351.212(c)). This system of reviews on request assumes that interested parties will request reviews if they are in disagreement with the cash deposit rates applied to the subject imports at the time of entry. In fact, Congress specifically established this statutory scheme to place the burden on the

parties who wanted their entries reviewed to request a review.[2] As shown below, Hitachi failed to request a review.

C. Hitachi's Entries And Its Opportunities To Request Administrative Reviews

Hitachi imported 38 entries of DRAMs manufactured by LG Semicon from February 1994 to April 1995. Hitachi purchased the Korean DRAMs from a Japanese reseller not affiliated with LG Semicon, the Korean manufacturer, and imported them with full knowledge that they were subject to the antidumping duty order. Hitachi was aware that its DRAMs were subject to the antidumping duty order because it was required to post cash deposits of estimated antidumping duties at the rate specified in the antidumping duty order. Hitachi was required by Commerce to post cash deposits at the rate of 4.97% applicable to DRAMs manufactured by LG Semicon. JA 47.

1. The first administrative review (October 1992-April 1994)

On May 4, 1994, in the first anniversary month of the DRAMs antidumping order, Commerce published notice of an opportunity to request a review for the first administrative review period, October 29, 1992 to April 30, 1994. *Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request*

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[2] Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 611(a)(1), 98 Stat. 2948, 3031 (1984); 19 U.S.C. § 1675(a). In the Trade And Tariff Act of 1984, Congress changed the antidumping law by making administrative reviews optional based upon the request of a party rather than mandatory as was the case under prior law.

An Administrative Review, 59 Fed. Reg. 23051 (Dep't Commerce May 4, 1994). Petitioner Micron requested an administrative review of "subject merchandise manufactured and/or sold by [LG Semicon] and or related parties. . . . " JA 66-67. Producers Hyundai and LG Semicon requested administrative reviews of their own pricing practices. JA 48-49, 52-53. Neither Hitachi nor its Japanese reseller, which was not affiliated with LG Semicon, requested a review of Hitachi's entries or participated in the review requested by the other interested parties. Commerce initiated an administrative review of the antidumping order on DRAMs from Korea pursuant to these requests. *Initiation Of Antidumping And Countervailing Duty Administrative Reviews And Request For Revocation In Part,* 59 Fed. Reg. 30770 (Dep't Commerce June 15, 1994).

On May 6, 1996, Commerce published the final results of the first administrative review. *Dynamic Random Access Memory Semiconductors Of One Megabit Or Above From The Republic Of Korea; Final Results Of Antidumping Duty Administrative Review,* 61 Fed. Reg. 20216 (Dep't Commerce May 6, 1996). Based on the sales reported by each reviewed company, Commerce found a weighted average dumping margin of 0.00% for LG Semicon and 0.06% for Hyundai. *Id.* at 20222. Because neither Hitachi nor its Japanese reseller requested a review, Hitachi's entries were not covered by the review and, therefore, were not examined by Commerce.

2. The second administrative review (May 1994-April 1995)

On May 10, 1995, in the second anniversary month of the DRAMs order, Commerce published notice of an

opportunity to request an administrative review for the second review period, May 1, 1994 to April 30, 1995. *Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review,* 60 Fed. Reg. 24831 (Dep't Commerce May 10, 1995). Petitioner Micron again requested an administrative review of "subject merchandise manufactured and/or sold by [LG Semicon] and/or affiliated parties. . . . " JA 102-103. Producers Hyundai and LG Semicon again requested administrative reviews of their own pricing practices. JA 95-96, 99-100. Commerce initiated the second administrative review of the antidumping order on DRAMs from Korea pursuant to these requests. *Initiation Of Antidumping And Countervailing Duty Administrative Reviews,* 60 Fed. Reg. 31447 (Dep't Commerce June 15, 1995). Again, neither Hitachi nor its Japanese reseller requested or participated in this review.

On January 7, 1997, Commerce published the final results for the second review period. Commerce determined a weighted average dumping margin of 0.01% for LG Semicon and 0.10% for Hyundai. *Dynamic Random Access Memory Semiconductors Of One Megabit Or Above From The Republic Of Korea; Final Results Of Antidumping Duty Administrative Review,* 62 Fed. Reg. 965, 968 (Dep't Commerce Jan. 7, 1997). Not having requested or participated in this review, Hitachi's entries, purchased from the Japanese reseller, were not taken into account in determining these rates, and no separate rate was calculated for Hitachi's entries.

D. Judicial Review Of Commerce's First And Second Administrative Reviews And The Issuance Of Commerce's Liquidation Instructions

Following publication of the final results of the first and second administrative reviews, Micron sought judicial review of certain aspects of Commerce's determinations. In each case, the CIT remanded the determinations to Commerce for further consideration and explanation of the basis for its determination. *See, e.g., Micron Tech. v. United States*, 44 F. Supp. 2d 216 (Ct. Int'l Trade 1999) (remanding first review determination on calculation of research and development expenses); *Micron Tech. v. United States*, 40 F. Supp. 2d 481 (Ct. Int'l Trade 1999) (remanding second review for consideration of constructed export price level of trade issue), *aff'd in part, rev'd in part*, 243 F.3d 1301 (Fed. Cir. 2001).

Following the CIT decisions affirming the redeterminations after remand in the first and second administrative reviews, Commerce issued its liquidation instructions to Customs for the first and second administrative reviews on November 1, 1999. Commerce's instructions covering DRAMs from Korea that were entered during the first and second review periods included importer-specific assessment rates for each of the importers whose entries were covered by the first and second administrative reviews, respectively. JA 145, 147. According to the instructions, entries of DRAMs from Korea imported by all other importers should be liquidated "at the rates required upon entry," that is, at the cash deposit rate. JA 145-46, 147. The first and second administrative review instructions applied to Hitachi's entries as non-reviewed entries not covered by the importer-specific instructions.

E. Judicial Review Of Commerce's Liquidation Instructions

Hitachi challenged Commerce's liquidation instructions, and the CIT held that Hitachi's entries should be liquidated at the manufacturer's rate calculated during the administrative review. *Nissei Sangyo Am., Ltd.*, No. 00-00113, 2003 Ct. Intl. Trade LEXIS 103 (Ct. Int'l Trade Aug. 18, 2003) (Pet. App. at 7a-21a). The CIT applied the reasoning of a nearly identical case decided by that court, *Consolidated Bearings Co. v. United States*, 166 F. Supp. 2d 580 (Ct. Int'l Trade 2001), *rev'd*, 348 F.3d 997 (Fed. Cir. 2003), and concluded, among other things, that (i) Commerce erred in applying the "knowledge test" to determine whether sales made through a reseller are "covered" by an administrative review and (ii) Commerce's November 1, 1999 liquidation instructions were arbitrary and capricious because they represented a change from Commerce's "past practice of liquidating at 'the rate established for the most recent period for the manufacturer of the merchandise,' 61 Fed. Reg. 20216, 20222." *Nissei Sangyo Am., Ltd.*, No. 00-00113, 2003 Ct. Intl. Trade LEXIS 103, at *16-18 (Ct. Int'l Trade Aug. 18, 2003).

Before the United States and Micron filed their appeals, the Federal Circuit reversed the CIT's *Consolidated Bearings* decision. *Consolidated Bearings Co. v. United States,* 348 F.3d 997 (Fed. Cir. 2003) ("*Consolidated I*"). The Federal Circuit held that an importer's entries purchased from a reseller unaffiliated with the manufacturer are not covered by an administrative review unless information about those entries is before Commerce during the review. *Id.* at 1005. Discussing the applicability of 19 U.S.C. § 1675(a)(2)(C) to sales made by a reseller, the Federal Circuit held the following:

> This subsection requires Commerce to apply the final results of an administrative review to all entries covered by the review. If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The "entries" must be "covered by the determination" to gain entitlement to the review's results as the "basis for the assessment" of duties.

Id. at 1005-06. The Federal Circuit also held that Commerce retained the discretion to determine the most appropriate method for assessing antidumping duties on unreviewed entries purchased from a reseller unaffiliated with the manufacturer, *id.* at 1007, and remanded the case with instructions to require the importer to show that "Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice." *Id.* Commerce conducted the remand and concluded that it had a practice of liquidating unreviewed entries from resellers unrelated to the manufacturer at the cash deposit rate. The Federal Circuit affirmed Commerce's remand determination on the ground that "substantial evidence supports Commerce's determination that it has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate." *Consolidated Bearings Co. v. United States,* 412 F.3d 1266, 1272 (Fed. Cir. 2005) ("*Consolidated II*").

In deciding the appeal of the instant case, the Federal Circuit was bound by its *Consolidated I* and *II* decisions. According to the Federal Circuit,

> Because a "reseller" rate determination was never requested by these importers [Hitachi] or their suppliers, *Consolidated Bearings I* directs

> that the appellee [Hitachi] does not have a statutory right to liquidation at the manufacturer's review rate.

Nissei Sangyo Am., Ltd., No. 04-1469, -1492, 2005 U.S. App. LEXIS 13277 (Fed. Cir. July 1, 2005) (Pet. App. at 6a) (citations omitted). The Federal Circuit also held that Commerce "'has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate.'" *Id.* (citations omitted).

V. REASONS FOR DENYING THE PETITION

A. The Federal Circuit's Decision Does Not Implicate An Important Issue Of Federal Law

1. Hitachi concedes that *certiorari* review of the Federal Circuit's actual decision in this case is unwarranted

Hitachi attempts to imbue the Federal Circuit's decision with significance by claiming that "imports into the United States compris[e] more than 10% of the U.S. gross domestic product" (Pet. at 3) and that "imports are a growing and significant portion of the national economy." (Pet. at 12).

These statements are misleading and irrelevant. Less than 0.5 percent of all imports into the United States are subject to an antidumping duty order,[3] and only a fraction

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[3] In 1999, Commerce Secretary William Daley testified that U.S. antidumping duty orders affected only a minuscule percent of U.S. imports:

> In 1998, total U.S. imports were $897 billion. Only about $4 billion of those were covered by antidumping duty orders. That means that 0.44 percent – less than one-half of one percent – of our worldwide imports were covered.

(Continued on following page)

of those imports are purchased from a reseller unrelated to the original foreign manufacturer rather than from the original foreign manufacturer directly. Moreover, as discussed in detail below, the antidumping statute authorizes reviews only upon request, and Commerce's regulations specifically permit importers to request a review of the pricing practices of the unrelated reseller/exporter. Thus, the Federal Circuit's decision affects only a tiny subset of importers – specifically, those who import goods covered by an antidumping duty order sold to them by resellers unrelated to the original manufacturer and who fail to request an administrative review of the reseller/exporter's pricing practices. This Court should not exercise its discretionary *certiorari* jurisdiction over a case that has such little impact on the importing community, particularly when the persons who would be affected by such decision can so easily protect their interests by the simple expedient of requesting an administrative review under the statute. 19 U.S.C. § 1675(a). Again, Hitachi did not protect its interests by requesting a review.

The Federal Circuit also appears to have recognized the limited application of its decision when it made the decision non-precedential under Federal Circuit Rule 47.6(b). (Pet. App. 1a). That rules states that "[a]n opinion or order which is designated as not to be cited is one determined by the panel issuing it as not adding significantly to the body of law."

Ministerial Meeting of the World Trade Organization (WTO): Hearing Before Senate Finance Comm., Sept. 29, 1999 (statement of William Daley, Sec'y of Commerce of the United States), *available at* www.ogc.doc.gov/ogc/legreg/testimon/106f/daley0929.htm.

Hitachi concedes the insignificance of the Federal Circuit's decision as an important issue of Federal law to the larger U.S. importing community when it states that the Federal Circuit's "ruling alone probably does not rise to a level justifying review by this Court." (Pet. at 15). Nevertheless, Hitachi claims that "Commerce's new and markedly different interpretation of Section 1675(a)(2)(C) is an entirely different matter." (Pet. at 15). Hitachi refers here to Commerce's 1998 proposed policy clarification, *Antidumping And Countervailing Duty Proceedings: Assessment Of Antidumping Duties*, 63 Fed. Reg. 55361 (Dep't Commerce Oct. 15, 1998) ("*Proposed Clarification*"), which proposed to require unreviewed entries purchased from resellers unaffiliated with the original manufacturer to be assessed the "all others" rate. According to Hitachi, the Federal Circuit's decision, coupled with the *Proposed Clarification*, "imposes potentially great costs on U.S. businesses" and "dooms U.S. companies to pay excessive duties on every importation into the United States of subject goods purchased from resellers." *Id.*[4]

In fact, the assessment policy described in the *Proposed Clarification* was not before the Federal Circuit or the CIT. The "all others" rate was not applied to Hitachi; the application of the "all others" rate was not at issue in the Federal Circuit or CIT cases; and neither the Federal

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[4] Hitachi also is wrong in asserting that the "all others" rate is "usually significantly higher than the rates calculated for individual manufacturers in annual reviews." (Pet. at 15). Rather, as Hitachi admits, the "all others" rate "represents the *weighted average* of the rates of all investigated producers as determined in the original investigation." (Pet. at 9) (emphasis supplied). Accordingly, the rate is sometimes higher and sometimes lower than the calculated rate for any individual manufacturer.

Circuit nor the CIT addressed whether an importer of merchandise exported by an unreviewed reseller should receive the "all others" rate or some other rate. Rather, the *Proposed Clarification* did not become effective until May 6, 2003 – after the events giving rise to this case. *Antidumping And Countervailing Duty Proceedings: Assessment Of Antidumping Duties*, 68 Fed. Reg. 23954, 23961 (Dep't Commerce May 6, 2003) ("*Assessment Clarification*"); *Consolidated I*, 348 F.3d at 1006-07. Based on the effective date of this case, the new policy clarification did not apply. If this Court is interested in the issue, it should deny Hitachi's petition and wait to review a case in which the "all others" rate was actually applied to an importer. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (dismissing a writ of *certiorari* as improvidently granted because deciding the case would require the Court to resolve a constitutional question that was entirely hypothetical).

2. The antidumping statute and Commerce's regulations provided Hitachi with a vehicle for review of the reseller's pricing practices and the calculation of a rate specific to its entries

Hitachi also contends that, "in failing to follow the plain meaning of Section 1675(a)(2)(C), the Federal Circuit has put U.S. importing businesses in a 'catch 22' situation." (Pet. at 15). According to Hitachi, the importer has only two choices: (i) it can "buy imported goods from only the producer, but then it will have to pay higher prices because it will not be able to seek competitive suppliers" or (ii) it can "buy goods from resellers, but then will have to pay higher prices because it will have to pay dumping duties at an outdated, artificially high rate [*i.e.*, the 'all

others' rate]." (Pet. at 15-16). The Federal Circuit's decision creates no such Hobson's choice. Rather, a third choice was available to Hitachi and remains available to other importers: request an administrative review of the pricing practices of the reseller/exporter that resold the subject merchandise to the importer.

In the Trade And Tariff Act of 1984, Congress changed the antidumping law by making administrative reviews optional based upon the request of a party rather than mandatory as was the case under prior law. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 611(a)(1), 98 Stat. 2948, 3031 (1984); 19 U.S.C. § 1675(a).[5] Pursuant to this legislation, Commerce promulgated its regulations permitting importers to request a review of their resellers and providing for assessment at the cash deposit rate of those entries for which no review has been requested. 19 C.F.R. § 353.22(a), (e). In particular, under the regulation applicable to Hitachi during the first and second reviews, "an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only a producer or *reseller* of the merchandise imported by that importer." 19 C.F.R. § 353.22(a) (emphasis supplied),

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[5] The accompanying House Conference Report to the Trade and Tariff Act of 1984 states that this provision

> [I]s designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority. The committee intends the administering authority should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including the elimination of suspension of liquidation, and/or the conversion of cash deposits of estimated duties, previously ordered. . . .

H.R. Conf. Rep. No. 98-1156 at 180, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5298.

Antidumping Duties, 54 Fed. Reg. 12742, 12778 (Dep't Commerce Mar. 28, 1989). Accordingly, Hitachi easily could have prevented the application of the cash deposit rate to its entries simply by requesting a review of its reseller. Indeed, two other importers in the first administrative review took advantage of this mechanism and requested reviews of 16 Japanese resellers of DRAMs. JA 56-57, 60-62. Just because Hitachi failed to use this procedure does not mean that the Federal Circuit's decision "imposes potentially great costs on U.S. businesses." These businesses, like Hitachi, always can request a review of the resellers/exporter's pricing practices.

3. The Federal Circuit's decision does not create unpredictability for U.S. importers

Hitachi contends that the Federal Circuit's decision conflicts with the statute, 19 U.S.C. § 1675(a)(2)(C), and Commerce's past practice, causing unpredictability and confusion in the importing community thereby implicating an important issue of Federal law. (Pet. at 11-12). In Hitachi's view, because no other avenue for review is available to U.S. importers through U.S. courts,[6] *certiorari* review is necessary to prevent the Federal Circuit's decision from becoming "the last word on the matter." *Id.*

The Federal Circuit's decision in this case does not create unpredictability in the U.S. importing community. As shown above, Commerce's administrative review regulation provides a mechanism by which an importer

[6] The CIT has exclusive jurisdiction over these cases. 28 U.S.C. § 1581(i). The Federal Circuit has exclusive jurisdiction over appeals from CIT judgments. 28 U.S.C. § 1295(a)(5).

can secure a calculated antidumping rate based on the exporter's pricing practices. Moreover, the Federal Circuit's decision did not create any inconsistency, unpredictability, or error in Commerce's administration of the statute with respect to those importers who fail to request a review. Rather, as explained in detail below, the Federal Circuit's decision was consistent with the statute. In particular, the Federal Circuit properly held that a reseller who does not request a review "does not have a statutory right to liquidation at the manufacturer's rate." (Pet. App. at 6a). The Federal Circuit's decision also is consistent with that court's only other decisions on this issue. *See Consolidated Bearings I*, 348 F.3d at 1005-06 (section 1675(a)(2)(C) "requires Commerce to apply the final results of an administrative review to all entries covered by the review. If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review"); *Consolidated Bearings II*, 412 F.3d at 1272 ("substantial evidence supports Commerce's determination that it has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate"); *Renesas Tech. Am., Inc. v. United States*, No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 21877 (Fed. Cir. Sept. 19, 2005), *petition for cert. filed*, No. 05-986 (U.S. Feb. 2, 2006) ("an unreviewed reseller is not statutorily entitled to the manufacturer's review rate and that [Commerce] has consistently liquidated unreviewed entries at the cash deposit rate").[7]

[7] *Renesas Technology America, Inc.* is also currently before this Court on a petition for writ of *certiorari*. *Renesas Technology America, Inc. v. United States*, No. 05-986. (U.S. Feb. 7, 2006).

The Federal Circuit's decision also is consistent with Commerce's automatic assessment regulation, 19 C.F.R. § 353.22(e), which requires Commerce to assess antidumping duties on merchandise for which no review has been requested at the cash deposit rate required at the time of entry, and with Commerce's historic assessment practice as held by the decision under review and *Consolidated II*.[8] In short, the Federal Circuit's decision presents no conflict with any authority or practice that generates confusion or unpredictability in the law among the U.S. importing community that would justify *certiorari* review by this Court.[9]

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[8] Citing *ABC Int'l Traders Co. v. United States*, 19 CIT 787 (1995), Hitachi claims that Commerce has used the manufacturer's calculated rate for unreviewed entries of unaffiliated resellers "in virtually all prior cases." (Pet. at 9). The Federal Circuit's examination of the extensive factual record of Commerce's historic assessment practice in *Consolidated II* and this case completely contradicts Hitachi's assertion. For a thorough discussion of Commerce's historic assessment practice, *see Consolidated II*, 412 F.3d at 1270-72. Moreover, the one case cited by Hitachi, *ABC Int'l Traders Co.*, does not support Hitachi's argument. Rather, that case involved entries that were "covered by the determination," that is, they were subject to the liquidation requirements of section 1675(a)(2)(C) because the manufacturer of ABC's entries had knowledge of those entries. *ABC Int'l Traders Co.*, 19 CIT at 791, n.6 ("The Court rejects ABC's attempts here to establish that the Japanese manufacturers at issue had no knowledge of the ultimate destination of their merchandise."). Under Commerce's "knowledge test," discussed below, these entries would have been examined by Commerce as part of the manufacturer's entries and included the calculation of the manufacturer's rate.

[9] Hitachi also claims that the Federal Circuit's decision was inconsistent with Commerce's 1998 *Proposed Clarification*. (Pet. at 10). The argument is beside the point, as the *Proposed Clarification* was not made effective until May 6, 2003, when Commerce issued its *Assessment Clarification*.

4. Review of the Federal Circuit's decision would require this Court to engage in a duplicative, fact-specific inquiry

The Federal Circuit's decision does not warrant *certiorari* review because such review would necessarily entail a detailed examination of the facts duplicative of the one already undertaken by the Federal Circuit. As noted above, the Federal Circuit held that Commerce "has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate." *Nissei Sangyo Am., Ltd.*, No. 04-1469, -1492 (Pet. App. at 6a) (citations omitted), *citing, Consolidated II*, 412 F.3d at 1272. The Federal Circuit reached this conclusion after examining over 100 pages of Commerce's liquidation instructions representing years of Commerce's assessment practice. This Court should not exercise *certiorari* jurisdiction to repeat a factual inquiry already conducted by the Federal Circuit in both *Nissei Sangyo* and *Consolidated II*. S.Ct.R. 10 ("A petition for writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

B. The Federal Circuit Correctly Decided The Case

It is undisputed that Hitachi failed to request a review. It also is undisputed that Hitachi's entries were not actually examined during Commerce's review of the manufacturer's U.S. sales. As shown below, no other review request by any other party encompassed Hitachi's entries. Based on these facts, the Federal Circuit held that, "[b]ecause a 'reseller' rate determination was never requested by these importers [Hitachi] or their suppliers,

. . . the appellee [Hitachi] does not have a statutory right to liquidation at the manufacturer's rate." *Nissei Sangyo America,* No. 04-1469, -1492, 2005 U.S. App. LEXIS 13277 (Fed. Cir. July 1, 2005) (Pet. App. at 6a). The Federal Circuit's decision was based expressly on *Consolidated I*, which concluded that, "[i]f the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The 'entries' must be 'covered by the determination' to gain entitlement to the review's results as the 'basis for the assessment' of duties." *Consolidated I* at 1005-06. The Federal Circuit also held that Commerce "'has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate.'" *Id.* Hitachi disputes these conclusions on several grounds, none of which has merit.

Hitachi first argues that Micron's request for a review of "the subject merchandise manufactured and/or sold by" LG Semicon, the manufacturer, during the first and second reviews meant that all LG-manufactured entries, including Hitachi's, were "covered by the determination." (Pet. at 6). Hitachi is wrong. Under the regulation in effect during the review, a domestic interested party "may request in writing that the Secretary conduct an administrative review of *specified* individual producers or *resellers* covered by an order, if the requesting person states why the person desires the Secretary to review those particular producers or resellers." 19 C.F.R. § 353.22(a)(1) (emphasis supplied).[10]

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[10] Commerce used similar language in the *Federal Register* notices announcing the opportunity to request administrative reviews:

> For antidumping reviews, the interested party must specify for which individual producers or resellers covered by an

(Continued on following page)

The Federal Circuit and the CIT have interpreted this regulation as requiring the domestic industry to identify *by name* the exporters for which it seeks a review before that exporter's entries are included within the scope of the request. *Floral Trade Council v. United States*, 888 F.2d 1366, 1369 (Fed. Cir. 1989) ("[Commerce] acted in accordance with its regulation when it declined to implement [petitioner's] request for review of importers and their unnamed suppliers because the request was not for review of 'specified individual manufacturers, producers, or exporters . . . .'"); *Floral Trade Council v. United States*, 17 CIT 1417, 1418 (1993) (section 353.22 of Commerce's regulation "may reasonably be interpreted as requiring requesters to *name* exporters and producers") (emphasis in original). Because Micron did not name Hitachi's reseller, Micron's review request cannot be interpreted as covering Hitachi's entries, and Hitachi had no right to expect that its entries would be covered by the review.[11]

Hitachi further argues that, "when Commerce conducts a review of a foreign party in its capacity as a producer, all entries of subject merchandise produced by that company are 'covered by the determination' in the annual review such that the determination 'shall be the

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> antidumping finding or order it is requesting a review, and the requesting party must state why the person desires the Secretary to review those particular producers or resellers.

Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review, 59 Fed. Reg. 23051, 23052 (Dep't Commerce May 4, 1994); *Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review*, 60 Fed. Reg. 24831, 24832 (Dep't Commerce May 10, 1995).

[11] In fact, Micron did not even know of the existence of Hitachi's first and second review entries until Hitachi filed its complaint in the CIT.

basis for the assessment of' antidumping duties on entries of the merchandise pursuant to 19 U.S.C. § 1675(a)(2)(C)." (Pet. at 13-14). According to Hitachi, therefore, Micron's request for a review of LG Semicon in its capacity as a producer necessarily included all LG-produced DRAMS, including those sold to unrelated third party resellers.

Hitachi's statement of the law is incomplete and misleading. Long-standing and judicially endorsed Commerce practice is to employ the "knowledge test" to determine whether resold entries are "covered by the determination."[12] Under the "knowledge test," Commerce does not include in its administrative reviews U.S. sales made through unaffiliated resellers without the knowledge of the manufacturer that the sales were destined for the United States. The reason for the "knowledge test" is straightforward: If the producer does not know that subject merchandise sold to a third party reseller was destined for the United States, the producer cannot include those sales in its U.S. sales database submitted to Commerce by that producer and considered by Commerce in its review. Also, if a producer does not have knowledge that its merchandise is destined for the United States, its price to the unaffiliated reseller cannot be considered a "U.S. price." Instead, it is a price to the market in which the reseller is located, in this case, Japan.

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[12] Contrary to Hitachi's suggestion that the "knowledge test" was invented as part of Commerce's assessment policy clarification (Pet. at 8, citing *Proposed Clarification*), the "knowledge test" has been an integral part of Commerce's practice for many years and has been sustained by the courts. *See, e.g., LG Semicon Co. v. United States*, 23 CIT 1074, 1079 (1999) ("Commerce's application of the 'knew or should have known' standard is in conformance with legislative history, is a consistent practice of the agency, and has been previously sustained by [the CIT]"), and cases and administrative determinations cited therein.

The record below makes clear that LG Semicon had no knowledge of Hitachi's entries. In accordance with its "knowledge test," Commerce's second review questionnaire asked for information regarding entries of subject merchandise sold through a reseller that LG Semicon knew were destined for the United States. JA 111. (*See* Attached Appendix at App. 9). In its questionnaire response, LG Semicon denied having any knowledge of such sales. *Id.* As a result, the weighted average dumping margin calculated by Commerce for LG Semicon's U.S. sales did not include Hitachi's entries.

Because Micron's review requests did not specify Hitachi's reseller, and because LG Semicon was unaware that subject merchandise it sold to the reseller had been imported into the U.S. by Hitachi, Hitachi's entries were not covered by the reviews. In fact, it was abundantly clear to Hitachi that its entries were not covered by the review. If its entries had been reviewed, Hitachi would have received an antidumping duty questionnaire and would have had to submit sales data to Commerce, which it did not do. Hitachi is a sophisticated importing company with sophisticated counsel. It knew quite well that its entries were not examined in the review because it received no questionnaire and did not answer any questions regarding its exports to the U.S. Therefore, to interpret Micron's requests in the manner proposed by Hitachi would permit entries about which Commerce had no pricing information to be presumptively assessed the rate established for the producer. There is no statutory, regulatory, or policy support for such an interpretation.

Hitachi also contends that Commerce advised it that "entries of all subject merchandise produced by the reviewed producers would be treated according to the results

of the reviews for producers." (Pet. at 6, citing the "Futtner Memorandum"). In fact, the Futtner Memorandum was drafted to address a liquidation issue completely unrelated to the one raised by Hitachi, that is, the assessment rates for certain "Japanese resellers for whom administrative reviews have been requested." JA 71. Because Hitachi did not request a review of its reseller, the Futtner Memorandum is inapposite. In addition, Hitachi could not have relied on the Futtner Memorandum in deciding not to request a review of its entries, because the memorandum was issued after Hitachi's opportunity to request a review in the first review had expired.[13]

Hitachi next argues that (i) the third review liquidation instructions covering LG Semicon-produced entries

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[13] The Futtner Memorandum was placed on the record of the first administrative review on June 15, 1994, after the opportunity to request a review had passed on May 31, 1994. *See Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review*, 59 Fed. Reg. 23051 (Dep't Commerce May 4, 1994).

Even if the Futtner Memorandum advised Hitachi that its entries would be covered by the review, which it did not, Hitachi would not have been entitled to rely on it because its interpretation of the memorandum is contrary to the automatic assessment regulation, 19 C.F.R. § 353.22(e), and because, under Commerce's delegation of authority and controlling case law, Mr. Futtner, a low level employee, was in no position to bind Commerce. 19 C.F.R. § 353.2(u) (delegating to the "Assistant Secretary for Import Administration the authority to make final determinations under [the administrative review provision]"); Department Organizational Order 10-3 (prohibiting redelegation of authority beyond the Assistant Secretary for Import Administration) JA 33-36; *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority").

ordered liquidation at the manufacturer's rate of entries that allegedly involved reseller transactions, including Hitachi's; and (ii) the first and second administrative review liquidation instructions covering entries produced by Hyundai, another Korean DRAMs producer, ordered liquidation at the manufacturer's rate of all entries, including unreviewed entries of unrelated resellers. (Pet. at 7-8).

There is no record evidence of any reseller transactions that were made without the knowledge of LG Semicon in the third review,[14] none is cited anywhere in the six-year history of this case, and the third review instructions make no mention of any resellers or any announced Commerce practice with respect to the assessment of unreviewed entries of unrelated resellers. JA 125-26, 139-40. Rather, the instructions simply refer to "all shipments" in much the same manner as the instructions considered and rejected as inconclusive of Commerce's practice by the *Consolidated II* Court. *Consolidated II*, 412 F.3d at 1271.

Similarly, there is no record evidence of any reseller transaction involving Hyundai-produced DRAMs in the first or second administrative reviews made without Hyundai's knowledge.[15] As pointed out in the briefs and at

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[14] Hitachi claims that it made entries during the third administrative review and that those entries were liquidated at the manufacturer's rate. (Pet. at 8). Hitachi, however, cites no record evidence for this assertion, and there is none. At oral argument before the Federal Circuit, counsel for Micron pointed out that no record evidence supported Hitachi's assertion, and counsel for Hitachi failed to rebut this fact with any cite to the record or any other document.

[15] In fact, it is doubtful there were any unreviewed entries of unrelated resellers involving Hyundai-produced DRAMs, as Hyundai had its own U.S. subsidiary, Hyundai Electronics America, which it

(Continued on following page)

oral argument before the Federal Circuit, the first and second administrative review instructions for Hyundai-produced DRAMs do not state that DRAMs were imported into the United States without the knowledge of the producer. JA 114-15, 123-24, 127-42. Nor do they refer to the existence of any resellers or any Commerce assessment practice for unreviewed entries of unrelated resellers. *Id.*

VI. CONCLUSION

For the foregoing reasons, Hitachi's petition for writ of *certiorari* should be denied.

Respectfully submitted,

GILBERT B. KAPLAN
Counsel Of Record
JEFFREY M. TELEP
DANIEL L. SCHNEIDERMAN
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 737-0500

Counsel for Respondent,
Micron Technology, Inc.

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used to enter its imports. *Dynamic Random Access Memory Semiconductors Of One Megabit Or Above From The Republic Of Korea; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 20216, 20217, Cmt. 1 (Dep't Commerce May 6, 1996).

APPENDIX

[JA 106]

[LOGO]

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230
A-580-812
ARP 05/01/94-04/30/95
Public Document

Goldstar Electron Co. Ltd/LG Semicon Co., Ltd.
c/o Michael P. House
Kaye, Scholer, Fierman, Hays & Handler
Suite 1100
901-15th Street, N.W.
Washington, DC 20005-2327

Jun. 26, 1995

Dear Mr. House:

I am writing to you on behalf of Import Administration, a unit of the United States Department of Commerce. On June 15, 1995, we initiated an administrative review to determine whether imports into the United States of a product that you are believed to produce and/or export were sold at prices that constitute dumping. We are examining sales, entries or shipments, as specified in the enclosed questionnaire, during the period May 1, 1994 through April 30, 1995. The products under review are dynamic random access memory semiconductors from the Republic of Korea. The antidumping duty order concerning this product went into effect on May 10, 1993.

We require the information requested in the enclosed questionnaire to determine whether subject merchandise that you produced and/or exported was in fact sold in, or to, the United States at prices below the normal value of the merchandise. General instructions for responding to the questionnaire follow immediately after the table of contents. We have divided the questionnaire itself into five

sections, A through E, and attached supplemental information, including a glossary of terms, in Appendices I through IV.

We request that you respond to sections A (General Information), B (Sales in the Home Market or to a Third Country), and C (Sales to the United States). If after examining sections A and C of the questionnaire you conclude that your company and its affiliates did not have any U.S. sales or shipments during the period identified above, please submit a statement to that effect, following the data submission requirements specified in the general instructions. If you do not submit such a statement for the administrative record in this case, we may conclude that your company has not been responsive to this questionnaire and may proceed on the basis of the facts available, as defined in the glossary of the attached questionnaire.

You are requested to respond at this time to the Cost of Production (COP) portion of section D if we disregarded below-cost sales in the most recently completed review or investigation of your company. Otherwise, you are not presently required to respond to the COP portion. However, if the petitioner or other U.S. domestic party alleges that your sales in the comparison market were made at prices below the cost of production, we may request at a later date that you respond to the COP portion.

If you are required to respond to the COP portion of section D for any of the reasons stated above, you must also respond to the Constructed Value (CV) portion of section D with respect to all products or models sold in the United States. If you are not required to respond to the COP portion, we request that you respond to the CV portion with respect to products or models sold in the United States for which you had no contemporaneous sales of comparable merchandise in the comparison market, or if the contemporaneous sales that you report were made to affiliates.

If the subject merchandise was further processed in the United States, you are generally required to respond to section E (Cost of Further Manufacture or Assembly Performed in the United States). However, if you believe the value added in the United States exceeds substantially the value of the merchandise imported into the United States, please contact the official in charge immediately.

Please refer to the cover page and general instructions of the enclosed questionnaire [illegible] period covered by this review, the due dates for responding to the questionnaire [illegible] instructions for filing the response. If you have any questions about those or any other [illegible], please contact the official in charge.

If you are unable to respond to this questionnaire within the specified time limits or are unable to provide the information in the form required, please contact the official in charge of this review. We will attempt to accommodate any difficulties that you encounter in answering this questionnaire. However, that accommodation cannot conflict with our obligation to conduct the review

within the timeliness and informational requirements of United States law. In order to complete this review within the statutorily mandated deadlines and to ensure that all interested parties have a sufficient opportunity to participate in this proceeding, extensions will not ordinarily be granted.

Sincerely,

/s/ Thomas F. Futtner
Thomas F. Futtner
Program Manager, Division I
Office of Antidumping
Compliance

PUBLIC VERSION

BEFORE THE
UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION

DYNAMIC RANDOM ACCESS MEMORY SEMICONDUCTORS OF ONE MEGABIT AND ABOVE FROM THE REPUBLIC OF KOREA	Case No. A-580-812 Second Administrative Review PUBLIC VERSION

RESPONSE OF LG SEMICON CO., LTD. AND LG SEMICON AMERICA, INC. TO THE DEPARTMENT OF COMMERCE REQUEST FOR INFORMATION

Michael P. House
Raymond Paretzky

Kaye, Scholer, Fierman,
Hays & Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 682-3500

Response to Section A

August 29, 1995

[JA 109]

PUBLIC VERSION

SECTION A

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[JA 110]

PUBLIC VERSION

LG SEMICON CO., LTD.
2ND ADMINISTRATIVE REVIEW

SECTION A

Organization, Accounting Practices, Markets and Merchandise

LG Semicon Co., Ltd. ("LGS") and LG Semicon America, Inc. ("LGSA") (collectively, "LG Semicon") hereby respond to § A of the Department's questionnaire.

1. Quantity and Value of Sales

Information on the quantity and value of sales is necessary to determine whether we will attempt to compare the prices of merchandise under review sold to the United States market to (a) the prices of comparable merchandise in your home market, (b) prices of comparable merchandise in a third-country market or (c) constructed value.[1] *Refer to the term viability in the Glossary of Terms at Appendix I for a more complete discussion.*

For the remainder of this section of the questionnaire we refer to the home market or third-country market selected

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[1] *Throughout this questionnaire, whenever we refer to the "products under review" or "merchandise under investigation," we are referring generally to all products within the scope of the order that your company sold during the period of review in any market. When we use the term subject merchandise, we are referring to products sold to the United States. When we use the term foreign like product, we are referring to products sold in your home market or exported to a country other than the United States. We have provided a description of the merchandise included in the review in Appendix III.*

for the calculation of normal value as the comparison market.

a. State the total quantity and value of the merchandise under review that you sold during the period of review ("POR") in:

9. Exports Through Intermediate Countries

If you are aware that any of the merchandise you sold to third countries was ultimately shipped to the United States, please contact the official in charge within two weeks of the receipt of this questionnaire.

9. Not applicable.

10. Sales of Merchandise Under Review Supplied by an Unaffiliated Producer

Please respond to this section of the questionnaire if neither your company nor an affiliate produced the merchandise under review which you sold in either the comparison market or to the United States.

10. Not applicable.